

DEC 12 2003 BC

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Michael N. Milby, Clerk

In re ENRON CORPORATION SECURITIES	§	Civil Action No. H-01-3624
LITIGATION	§	(Consolidated)
_____	§	
	§	<u>CLASS ACTION</u>
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On	§	
Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
_____	§	

**ENRON'S RESPONSE TO BANK DEFENDANTS' SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO THE MOTION OF ENRON CORP. FOR RELIEF FROM
AUGUST 2002 DISCOVERY ORDER**

TO THE HONORABLE MELINDA HARMON:

Enron Corp. ("Enron") files this Response To Bank Defendants' Supplemental Memorandum In Opposition To The Motion Of Enron Corp. For Relief From August 2002 Discovery Order (the "Response").¹ In support of its Response, Enron respectfully shows as follows:

I. PRELIMINARY STATEMENT

This discovery dispute is not about denying the Bank Defendants access to relevant information, or even to a raft of irrelevant information they claim they want. The dispute is

¹ On December 5, 2003, the Bank Defendants filed their Supplemental Memorandum in Opposition to the Motion of Enron Corp. for Relief from August 2002 Discovery Order and in Support of the Bank Defendants' Cross-Motion for an Adjustment to the Scheduling Order (the "Supplemental Memorandum"). The Bank Defendants are identified in note 1 of the Supplemental Memorandum.

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about the logistics of providing that information, and the costs that a third-party chapter 11 debtor should be required to bear. In the Supplemental Memorandum, the Bank Defendants spend a great deal of time and effort doing nothing more than casting aspersions on Enron's document production efforts. Looking past the Bank Defendants' disparagement of Enron's massive document production efforts, it is clear that Enron and the Bank Defendants are now in substantial agreement with respect to what documents Enron should produce in *Newby* from this point forward, assuming that discovery in these cases continues under the August Order², and in accordance with the Depository Order.³ Although Enron has proposed to the Bank Defendants alternative discovery methods it believes would provide superior document access and information, the Bank Defendants have made clear they want Enron to continue production under the Court's August Order, in spite of the limitations of that process, which result from the manner that information was produced originally to the government, and the steep costs associated with the production.⁴ Enron is able to continue to produce documents under the August Order, but requests a limited modification of the August Order to expressly exclude from its scope the Trading Databases⁵, which are both voluminous and irrelevant to the issues in this case. Based on the Supplemental Memorandum, it appears that the Bank Defendants would not object to such a modification.⁶ Additionally, Enron requests a limited modification of the

² See Order entered on August 16, 2002 (*Newby* Docket Entry No. 1008) (the "August Order").

³ See Order Establishing Document Depository, entered on October 31, 2002 (*Newby* Docket Entry No. 1116) (the "Depository Order").

⁴ With limited exceptions, the Bank Defendants are now the only parties to *Newby* requesting Enron to continue making productions under the August Order. As the Requesting Party, the Bank Defendants are responsible, at least in part, for the Depository costs associated with the continued productions.

⁵ Enron has produced to the Federal Energy Regulatory Commission ("FERC") the equivalent of hundreds of millions of pages of data relating to FERC's investigation of energy marketing practices. Hereinafter these documents are referred to as the "Trading Databases."

⁶ See Supplemental Memorandum at p. 12.

Depository Order to clarify that, because Enron is still protected by the Automatic Stay, with respect to *Newby*, Enron is a “Third Party” within the meaning of the Depository Order, and not a “Designated Party.”⁷

Accordingly, Enron intends to forge ahead and produce to the Depository the outstanding documents the Bank Defendants request. Because Enron is a third party to *Newby*, the August Order is the only instrument requiring Enron to produce documents in *Newby*. Enron therefore expects that its compliance with the August Order will satisfy its third party discovery obligations in *Newby*. Although the discovery process in this case has been difficult and burdensome, because of both the sheer volume of documents involved and the complex nature of the secondary discovery process, Enron has endeavored in good faith to produce documents to the *Newby* parties, as is evidenced by the millions of pages of documents produced already to the *Newby* Depository, and Enron will continue to do so.

At the same time, however, Enron remains a third party to *Newby*, and as a chapter 11 debtor, Enron, and ultimately its creditors, should not have to shoulder an inordinate cost burden to produce documents, especially given the relatively limited usefulness of the current Document Depository. Thus, Enron seeks a modification of the current Depository Order that would otherwise force Enron to bear the brunt of the Depository costs associated with continued production under the August Order. Specifically, Enron asks that the Depository costs associated with document production in *Newby* be placed on those requesting the documents,⁸ which would help alleviate the financial burden on Enron’s creditors and encourage those parties requesting documents to seek only those documents for which they are willing to pay. Enron

⁷ See Depository Order at II.B, and II.E (defining “Designated Party,” and “Third Party,” respectively).

⁸ See *supra* note 3 (explaining that the Bank Defendants are now the Requesting Party for the August Order document productions pursuant to the terms of the Depository Order cost allocations).

would continue to bear its own substantial internal costs in connection with production to the Depository. Although the parties in these cases are in the process of further exploring ways to coordinate and streamline the discovery process, and the Court has now suspended the discovery schedule until a hearing tentatively scheduled for January 22, 2004, the Bank Defendants have insisted that Enron continue producing documents to the Depository under the August Order even during this “time out” period. Therefore, Enron expressly reserves the right to seek reimbursement of all Depository costs expended after the filing of Enron’s Motion for Limited Modification of the Court’s Depository Order and of the Court’s August, 2002 Discovery Order (“Enron’s Motion”).

II. AS A THIRD PARTY, ENRON REQUESTS A LIMITED MODIFICATION OF THE DEPOSITORY ORDER TO CLARIFY THAT ENRON IS NOT A “DESIGNATED PARTY” TO THE *NEWBY* DEPOSITORY

Because of the automatic stay,⁹ Enron is not a party to *Newby*. Although the Bankruptcy Court modified the automatic stay to allow the Newby Plaintiff to obtain a “limited” amount of documents from Enron pursuant to the August Order, the Bankruptcy Court has not modified the stay as it applies to *Newby* for any other purpose.¹⁰ Nevertheless, the Depository Order defines Enron as a “Designated Party,” and thus requires Enron to pay Depository production costs each time it produces documents to the *Newby* Depository.¹¹ Because the automatic stay has been lifted only to allow Enron to participate in *Newby* as a third party to the discovery process, Enron should not fall within the definition of “Designated Party” as that term is defined in the Depository Order. Instead, Enron requests that the Court acknowledge Enron’s third party status

⁹ See 11 U.S.C. § 362(a)(1)

¹⁰ See Enron’s Motion for a Limited Modification of the Court’s Depository Order and of the Court’s August 2002 Discovery Order, filed on December 5, 2003, at pp. 4-5.

¹¹ See Depository Order at Part II.B. (defining “Designated Party”) and Part VIII (allocating expenses among “Producing” and “Requesting” parties).

in *Newby* and clarify that, with respect to *Newby*, Enron is a “Third Party” within the meaning of the Depository Order. Again, Enron has no desire to withhold any non-privileged documents that the parties believe are relevant Enron respectfully requests, however, that the Court clarify that Enron is a third party to the *Newby* case, which will allow Enron to carry out its discovery obligations without undue burden.

III. ARGUMENT AND ANALYSIS IN SPECIFIC REPLY TO BANK DEFENDANTS’ MEMORANDUM

Based on the Supplemental Memorandum, the Bank Defendants have two stated objectives: First, they want to ensure continued access to all of the documents Enron is producing to government investigators,¹² and second, they seek an adjustment to the current Scheduling Order in *Newby*.¹³ While Enron is prepared to diligently continue document production under the August Order as the Bank Defendants’ request, Enron cannot commit to a time by which the Depository Administrator will have completed its work and posted to the *Newby* Depository all of the documents Enron has produced to the government. Enron is preparing to provide to the Depository Administrator in the coming weeks, a substantial amount, which Enron currently estimates to be approximately 75%, of the outstanding documents, obviously excluding any additional future productions Enron makes to the government.

A. The Bank Defendants Apparently Do Not Oppose Enron’s Request for a Limited Modification of the August Order

Enron has specifically requested a narrow modification of the August Order to expressly relieve Enron of the burden to produce the hundreds of millions of pages of Trading Databases. Enron believes that the vast majority of information contained in the Trading Databases has no

¹² See Supplemental Memorandum at 3-4.

¹³ See *id.* at 14-16.

relevance to any legitimate issue in *Newby* or the related cases, and the Bank Defendants do not appear to oppose this relief.¹⁴ Because there appears to be no objection, and as supported by Enron's Motion for Limited Modification of the Court's Depository Order and of the Court's August 2002 Discovery Order, Enron respectfully requests the August Order be modified to expressly exclude from its scope the Trading Databases.

B. Enron will Continue Producing Documents Pursuant to the August Order as Expeditiously as Possible

Pursuant to the Bank Defendants' request, Enron will continue productions under the August Order just as fast as reasonably possible.¹⁵ While the Bank Defendants continue to accuse Enron of "non-compliance"¹⁶ with the Court's August Order and "withholding" documents from production, what the Bank Defendants continue to ignore is that a production of this scale and under the specific requirements of the Depository Order takes an inordinate amount of time to complete.¹⁷ Given the volume of production and the manner in which the information originally was produced to the government over the past two years, Enron estimates it will be able to produce to the Depository Administrator in the next few weeks a majority of the outstanding documents subject to the August Order.¹⁸ Because Enron does not have a more

¹⁴ See Supplemental Memorandum at p. 12.

¹⁵ See Supplemental Memorandum at 4 (requesting that Enron be ordered to comply with the August Order "just as fast as it can").

¹⁶ See *id.* at 6.

¹⁷ Additionally, a production this size, and under the terms of the Depository Order, is expensive. Although the Bank Defendants assert in note 7 of the Supplemental Memorandum, that because Enron sued the Bank Defendants in the Bankruptcy Court, Enron's complaint about the excessive costs of the production "rings hollow," the point is misplaced. The adversary proceeding is separate and distinct from the *Newby* proceeding. Although the Parties are exploring the feasibility of coordinated discovery methods, it is currently unknown what discovery demands or limitations will be placed on the parties in the Bankruptcy Court.

¹⁸ The estimated volume of outstanding production is approximately 77 million pages of documents, including 626 CDs, 21 DVDs, 22 hard drives, and approximately 5 million pages of entries individually Bates-numbered. See

detailed document production index than that already given to the Bank Defendants, and because Enron does not have available an efficient means to quickly revise the index to provide more detail, it will prioritize its continued document productions in chronological order, focusing first on the earlier-produced documents and working forward to the more recently produced documents.

1. Enron's Secondary Document Production Has Been Difficult and Time Consuming

There is no doubt Enron has not yet produced to the *Newby* Depository all documents produced to the government that are within the scope of the August Order. Enron is committed, however, to continuing its production efforts. The document production in this case is very different from the document production conducted in most other cases. Ordinarily, one party requests from another party documents that it believes will lead to the discovery of admissible evidence, and the process of document production follows an orderly sequence. In this case, however, Enron has been ordered to produce to the *Newby* Depository virtually all documents produced to the government, regardless of the volume produced to the government, the circumstances under which the documents were produced to the government, the form in which the documents were originally produced, or the relevance of the documents to the instant proceeding. This Court's August Order requiring Enron to reproduce in this case the documents already produced to the government came months after the government had already begun

Affidavit of Bonnie J. White in Support of Motion for Limited Modification of the Court's Depository Order and of the Court's August 2002 Discovery Order ("White Affidavit") at ¶ 7. Although the Bank Defendants purport to seek a narrower production under the August Order – excluding the Trading Databases – by claiming that documents produced in particular to the DOJ, SEC, FBI, and PSI are the main documents of interest, *see* Supplemental Memorandum at 8-11, those agencies identified by the Bank Defendants are by far the primary government investigators. With the exception of the Trading Databases, the Bank Defendants have not really reduced the universe of documents to be produced at all. For example, the Bank Defendants' "priority productions" account for over 65 million pages of the estimated total 77 million pages of documents described on Enron's document production index and electronic media index, attached as Exhibits "A" and "B," respectively, to the White Affidavit.

searching for, requesting, and seizing documents from Enron. In other words, this is a secondary production based upon a primary production that was conducted under colossal time pressures from several different branches, agencies, and committees of the United States government (as well as the governments of several states).

When making the government productions, Enron's chief concern has been to satisfy government investigators, not to ensure that it could quickly and easily replicate for civil litigants the productions made to the government. Enron has remained committed to cooperate with government investigations and has promptly responded to their requests. As a result, Enron has spent a great deal of time over the past year duplicating its government production for production to the *Newby* Depository.

The government productions made by Enron were in large part facilitated by outside law firms. Enron would collect documents that appeared to be responsive and then forward them on to the law firms who would then make a further review for relevance and privilege. The law firms would then record the Bates ranges of the documents and the documents would then be sent on to the requesting agencies. So while Enron would have copies of these documents, they would not have copy sets of the productions. This would be further complicated when the law firms would Bates label the documents themselves. In such cases not only would Enron not have a production set, they would not be able to tie the documents back to the listed Bates ranges. In some instances the law firms did not receive the documents directly from Enron, even though they were an Enron production, and Enron would not have received a set of the documents at all.

Currently, Enron estimates it has identified and located the majority of the outstanding documents, which Enron estimates could equal more than 60 million pages of documents, and is committed to finalizing delivery of these documents to the *Newby* Depository in the next few

weeks. At the same time, while Enron continues to respond to government requests, and provide what it can to the *Newby* Depository, Enron also continues to search for all of the remaining documents outstanding to date.

2. The Difficulty Inherent in Enron's Secondary Document Production is Reflected in its Document Production Index

As ordered by the Court on October 20, 2003, Enron produced to the Bank Defendants an index¹⁹ of documents it has produced to the specified government investigators over the past two years. Enron regrets that the document production index is not more substantively detailed for the benefit of all litigants. Because Enron was not under a duty to create a document production index at the time the tens of millions of pages of documents were produced in the first instance to the government, and because it could not have physically done so given the speed at which the government demanded a massive amount of information, Enron has not been able to more specifically index the production.

Although Enron understands the Bank Defendants' apparent frustration with the document production index, it was the best Enron could do given the speed and manner in which the documents were produced originally to the government over the past couple of years. Because there is no better way to prioritize the document production, Enron will reproduce the documents to the *Newby* Depository generally in the chronological order they were originally produced to the government.

C. Notwithstanding Enron's Delivery of Documents to the Depository, Enron Estimates it Could Take the Depository Administrator Several Months to Finalize Production of Enron's Documents Currently Outstanding

Because the Bank Defendants appear to be relying on the production of Enron's documents in requesting an alteration to the Scheduling Order in this case, Enron will address as

¹⁹ See Affidavit of Bonnie J. White, and Exhibit "A" thereto.

best it can the estimated time it will take to complete a production of this size, given the volume of documents outstanding to date. According to the Depository Order, both hard copy and electronic documents produced in the captioned matter must be uploaded in a specific format, regardless of the format in which the documents were maintained and, significantly, regardless of the format in which the documents subject to the August Order were originally produced by Enron to the government. Specifically, the Depository Order entered in October 2002 requires that documents be produced to the Depository in a “Group IV .tiff” format.²⁰ Using Enron’s document production index and information gleaned from discussions with the Depository Administrator over the past year, Enron estimates it could take several months for the Depository Administrator's current staff to finalize production of the documents subject to the August Order outstanding to date, especially if a sizeable portion of Enron's production is in hard copy or Portable Document format.

1. Enron’s Electronic Document Production²¹

The Depository Order requires that electronic images, produced in their original format, be converted by the Depository Administrator to .tiff images, branded with a Bates number, and indexed.²² Processing Enron’s electronic documents that are produced in native format could take several months. Based upon information provided by Lex Solutio, the Depository Administrator, assuming the Depository Administrator could devote half of its current inventory of equipment exclusively to Enron’s production efforts, Enron estimates that approximately 10 gigabytes of electronic data, or 1 million pages, could be converted to the requisite .tiff format

²⁰ Depository Order at IV.

²¹ This discussion of Enron's electronic productions does not include the trading databases produced to FERC.

²² Depository Order at IV(A)(2).

per day. Assuming 90% of Enron's 77 million pages of documents are in native electronic format, approximately 70 million pages must be converted to .tiff, which could take over 2 months to complete. The images must then be downloaded to portable media sources for Bates labeling and uploading onto the Depository Administrator's main server, which could take another few weeks. Metadata from the imaged data is then captured by the server to generate an index according to the specified fields outlined in the Depository Order.²³ Once the required fields are indexed, the images can be distributed to the parties, and production notices are posted on the ESL website. Processing the electronic documents could therefore take several months to complete.

2. Enron's Hard Copy and .pdf Document Production

Like the electronic documents, the Depository Order requires that hard copy documents, including electronic documents in Portable Document Format (".pdf"), produced in their original format be converted by the Depository Administrator to .tiff images, branded with a Bates number, and indexed. Many of the documents Enron has produced to government investigators – approximately 10% or 8 million pages of the outstanding documents – were produced in .pdf, and now, under the August Order, they are being produced to the *Newby* Depository in the same format.

After the documents are converted to .tiff, each converted page must be examined in order to separate individual documents from one another and then each converted page must be examined to verify it is in proper Bates sequence. The process of converting, verifying, coding and indexing, and then uploading Enron's outstanding hard copy and .pdf documents could take the Depository Administrator over a year to finalize. While converting the 8 million or so pages

²³ See Depository Order at IV(A)(1)–(2) (listing required fields for mandatory Depository index).

may take just over a week to complete, inserting page-breaks in the documents and correcting the Bates sequences could take another couple of months to finalize. By far the most time consuming and expensive process would be hand coding and indexing each of the estimated 2 million documents. On average, the Depository Administrator assumes its current staff can code and index approximately 5,000 hard copy or .pdf documents per day, but with almost 2 million documents to index, it could take the document coders a year to finalize an index according to the terms of the Depository Order.

D. As a Third Party to *Newby*, Enron Does Not Oppose the Bank Defendants' Request for Continuance

The Bank Defendants have requested a three month adjournment to the commencement of depositions in *Newby*.²⁴ Because Enron is not a party to *Newby*, Enron neither opposes or joins the Bank Defendants' request to adjourn the start of depositions. As the Court is aware, the automatic stay has been lifted only to allow Enron to participate in *Newby* as a third party to the discovery process.

IV. CONCLUSION

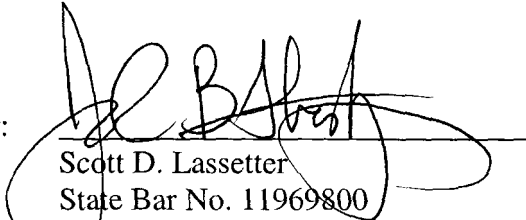
Enron has never objected to providing the *Newby* parties access to its documents -- cost and logistics are the difficult issues confronting Enron. Accordingly, for the reasons set forth in the underlying Motion for a Limited Modification of the Court's Depository Order and of the Court's August 2002 Discovery Order, and in this Response To Bank Defendants' Supplemental Memorandum In Opposition To The Motion Of Enron Corp. For Relief From August 2002 Discovery Order, Enron respectfully asks the Court to modify the Depository Order to clarify that Enron, as of the date of the filing of Enron's Motion, is a Third Party to the *Newby*

²⁴ See Bank Defendants' Supplemental Memorandum at 14.

Depository and requests that the August Order be modified to relieve Enron of the obligation to produce documents from the Trading Databases.

Dated: December 12, 2003

Respectfully submitted,

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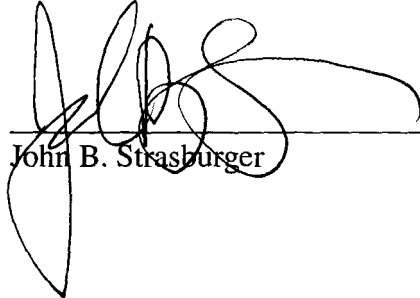
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all known counsel of record by sending a copy via electronic mail to serve@ESL3624.com, pursuant to the Court's Order dated August 7, 2002 (Docket No. 984), on this 12th day of December 2003.



John B. Strasburger